In the District Court of the United States for the District of Minnesota

Civil Action No. 253

ERNEST E. MOORE, DOING BUSINESS AS MOORE MOTOR FREIGHT LINES, PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, and Rule 7, paragraphs 3 and 4, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's petition to annul, set aside and enjoin an order of the Interstate Commerce Commission entered March 13, 1941. The Commission's order denied appellant's application for a certificate as a common carrier or in the alternative for a permit as a contract carrier by motor vehicle under the grandfather provisos of Sections 206 (a) and 209 (a) of the Motor Carrier Act, 1935. The evidence before the Com-

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mission showed, and the Commission found, that appellant's claim to grandfather authority was based upon operations conducted through equipment owned and operated by other persons.[1] Appellant secured orders for transportation and then negotiated with truckers who held appropriate state operating rights to perform the carriage service; he held no such rights in his name, assumed no responsibility for operating expenses, and expressly contracted against any liability to the general public resulting from the performance of the transportation service. On this and other evidence the Commission found that the operations relied upon to support appellant's claim to grandfather rights were insufficient to establish in him a bona fide carrier status, either common or contract, on and continuously after the applicable grandfather date.

The decree of the court below sustaining the Commission's order should be affirmed without argument because the appeal therefrom presents no substantial question. There are three assignments of error: (1) That the Commission's order violates the Fifth Amendment because it "is premised upon matter and information foreign to and outside of the record;" (2) that the Commission's order proceeds upon an erroneous construction of the Act; and (3) that the findings are not supported by evidence.

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[1] Appellant owned a half interest in one piece of equipment on the critical date but operation of it was discontinued in February 1937.

1. The claim that the Commission gave consideration to matters outside the record is not supported by any allegation of the complaint; the assertion was first made in the course of argument and the basis for it was never explained. In rejecting the contention the district court said:

> The first contention made by the plaintiff requires no discussion, since the plaintiff has failed to point out in his oral or written arguments (and we have been unable to find from a search of the record) any matter foreign to or outside the record which has been found as a fact or suggested as a basis for any conclusion thereon by the Commission.

2. The law of the case is settled by the decisions of this Court. The Commission held on the evidence that appellant's operations did not satisfy the definition of a "common carried by motor vehicle" contained in the Act. Its conclusion is supported by the decision in *Acme Fast Freight* v. *United States*, 30 F. Supp. 968, affirmed per curiam 309 U. S. 638. The absence of equipment for over-the-road transportation and of substantial responsibility to the general and shipping public for the operations conducted suggests a possible status as broker or forwarder but plainly negatives a status as carrier, as that term is narrowly defined in the Act. The Commission's conclusion finds support also in this Court's decisions in *United States* v. *Rosenblum*, No. 52, this Term, *United States* v. *Margolies*, No. 53, this Term, *Lubetich* v. *United States*,

No. 322, this Term, all decided January 19, 1942. In those cases the applicants were owner-operators who transported freight, usually over-flow freight, for carriers; and this Court affirmed the Commission's ruling that such operators did not have a status as carriers under the Act. Appellant claims here to have occupied a position analogous to that of the carriers in the cited cases and to have conducted a carrier service through the medium of owner-operators. The Commission found that appellant did not have direction and control over, or responsibility for, the operation which was essential to the creation of a carrier status. Its conclusion was based upon considerations consistent with those which determined its judgment in the *Rosenblum, Margolies,* and *Lubetich* cases. It follows, as the court below held, that the Commission's construction and application of the law was correct and that its findings support the order.

3. The appellant's final assignment of error charges insufficiency of the evidence to sustain the Commission's findings. The question is not substantial and there is no merit in the arguments advanced by appellant. In the hearing before the Commission the issue was whether or not appellant's operation on the grandfather date was that of a carrier. Evidence was fully adduced on this point and the Commission duly considered and weighed it. The controverted matters of fact raised in the proceeding were settled by the Com-

mission's decision. *United States* v. *Maher*, 307 U. S. 148, 153–154. While appellant made a general claim in the district court that the findings of the Commission were contrary to the evidence, that court said:

> From a search of the record we have been unable to find any specific instance where the findings are without support in the evidence.
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> * * * * *
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> A careful examination of the record before the Commission satisfies this court that the findings of the Commission are founded upon substantial evidence.

For the foregoing reasons, it is evident that the errors assigned by appellant are without substance. It is respectfully submitted that the judgment of the district court should be affirmed.

CHARLES FAHY,
Charles Fahy,
Solicitor General,

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission.

Receipt of a copy of the above motion to affirm is acknowledged this 27 day of Feb. 1942.

ERNEST A. MICHEL,
Ernest A. Michel,
THOMAS W. WALSH,
Thomas W. Walsh,
Counsel for Plaintiff-Appellant.

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